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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 624

WINTHROP TAYLOR, PETITIONER

v.

JOSEPH P. MARCELLE, COLLECTOR OF INTERNAL REVENUE, FIRST DISTRICT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 39-41) is reported in 97 F. Supp. 35. The *per curiam* order of affirmance of the Court of Appeals (R. 46-47) is reported in 199 F. 2d 759.

JURISDICTION

The judgment of the Court of Appeals was entered on December 1, 1952. (R. 48.) The petition

for a writ of certiorari was filed on February 26, 1953. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

In 1934 the Board of Tax Appeals made an order determining a deficiency in taxpayer's income tax for 1929. In 1935, on taxpayer's appeal, the Court of Appeals affirmed the order of the Board. In 1944 the Court of Appeals denied a petition filed by taxpayer to review the 1935 judgment. Thereafter, taxpayer paid the Collector the amount of the deficiency.

The question now presented is whether the courts below erred in holding that on these facts the issue of taxpayer's liability for the 1929 tax deficiency had been finally adjudicated and that taxpayer's present suit brought in 1949 in the District Court for refund of the amount paid in satisfaction of the deficiency was barred.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and Regulations are printed in the Appendix, *infra*, pp. 7-9.

STATEMENT

In 1949 taxpayer sued in the District Court for refund of $103,522.23 paid to the Collector for a deficiency in income tax for 1929, including interest, alleged to have been illegally collected. (R. 5-11.) After the Collector answered, setting up in affirmative defense that the issue raised in the complaint had already been finally adjudicated in the Board

of Tax Appeals and in the Court of Appeals and that the instant suit was barred (R. 13-15), both sides moved for summary judgment (R. 2-3, 40). The District Court granted the Collector's motion (R. 39-42), and dismissed the complaint. The Court of Appeals entered a *per curiam* order affirming the judgment on the opinion below. (R. 46-48.)

The relevant facts, which are not in dispute (R. 41), are these: On March 15, 1930, taxpayer returned and paid income tax for 1929 in the amount of $64,103.19. The Commissioner on September 17, 1932, determined that certain gains from the sale of corporate stock were not capital gains, as reported by taxpayer, but were taxable as ordinary income, and that taxpayer's return was deficient in the sum of $51,353.70. (R. 5-6, 13.) On November 3, 1932, taxpayer filed a petition with the Board of Tax Appeals for redetermination of the deficiency. (R. 6-7, 13.) After trial of the issues raised, the Board filed its memorandum decision (1934 P-H B.T.A. Memorandum Decisions, par. 34,310) on June 15, 1934, finding for the Commissioner on the merits, and entered an order sustaining the deficiency in the amount of $51,353.70, which, together with interest, was assessed against taxpayer on October 15, 1934 (R. 7, 14).

Taxpayer then appealed to the Court of Appeals for the Second Circuit, which on April 15, 1935, entered judgment affirming the order of the Board. (R. 7-8, 14.) *Taylor* v. *Commissioner,* 76 F. 2d

904. On October 14, 1935, this Court denied certiorari. (R. 14.) 296 U.S. 594.

Nearly ten years later, taxpayer in 1944 petitioned the Court of Appeals to review its 1935 order of affirmance. The Court of Appeals rejected this application, and this Court denied certiorari. (R. 40.) 324 U.S. 871.

Between July 17, 1945, and December 15, 1947, taxpayer paid to the Collector under protest the full amount of the deficiency thus determined, together with interest, aggregating $108,842.12. (R. 9, 15.) Taxpayer seeks to recover refund of this payment by the present suit (R. 15), dismissed by the courts below.

After the District Court granted summary judgment in favor of the Collector in the instant proceeding, and prior to the consideration of the case by the court below, taxpayer again moved that court to set aside its 1935 judgment. Taxpayer's motion was denied. 194 F. 2d 528. Earlier in the present term, this Court denied taxpayer's petition for certiorari to review that action. 344 U. S. 822 (No. 114, this Term.)

ARGUMENT

The courts below were clearly correct in holding this to be a repetitious suit involving the same cause of action which had already been finally and conclusively adjudicated against taxpayer by the Board and the Court of Appeals.[1] *Tait* v. *Western*

[1] The opinions of both tribunals establish that the question as to whether the stock had been held for more than two years was litigated and decided adversely to the taxpayer (memo-

Md. Ry. Co., 289 U.S. 620; *Commissioner* v. *Sunnen*, 333 U.S. 591, 597-598. By the specific provisions of Section 322 (c) of the Internal Revenue Code (Appendix, *infra*, p. 7), Congress intended to achieve finality in determinations by the Board of a taxpayer's liability for the particular year in controversy. A taxpayer has the option of litigating the legality of a deficiency either by appeal to the Tax Court before he pays, or by paying and thereafter suing to recover any overpayment; he may not choose both remedies, pursuing the latter *de novo* as if his claim had not already been determined by the outcome of the former.[2]

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randum opinion of the Board, *Taylor* v. *Commissioner*, decided June 15, 1934 (1934 P-H B.T.A. Memorandum Decisions, par. 34,310, pp. 34-363-364), affirmed, 76 F. 2d 904, 906-907 (C.A. 2d).)

[2] Taxpayer's contention (Br. 9-10) that the instant case falls within the second exception stated in Section 322 (c) to its general rule (Appendix, *infra*, p. 7) is without merit. The decision of the Board which became "final" was its decision as affirmed by the Court of Appeals in 1935. Internal Revenue Code, Section 1140 (b) (2) and (c) (2). (Appendix, *infra*, pp. 8-9.)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APRIL 1953.

APPENDIX

Internal Revenue Code:

SEC. 322. REFUNDS AND CREDITS.

* * * * *

(c) *Effect of petition to Board.*—If the Commissioner has mailed to the taxpayer a notice of deficiency under section 272 (a) and if the taxpayer files a petition with the Board of Tax Appeals within the time prescribed in such subsection, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—

(1) As to overpayments determined by a decision of the Board which has become final; and

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Board which has become final; and

(3) As to any amount collected after the period of limitation upon the beginning of distraint or a proceeding in court for collection has expired; but in any such claim for credit or refund or in any such suit for refund the decision of the Board which has become final, as to whether such period has expired before the notice of deficiency was mailed, shall be conclusive.

* * * * *

(26 U.S.C. 1946 ed., Sec. 322.)

SEC. 1140. DATE WHEN BOARD DECISION BECOMES FINAL.

The decision of the Board shall become final—

* * * * *

(b) *Decision Affirmed or Petition for Review Dismissed.*—

* * * * *

(2) *Petition for Certiorari Denied.*—Upon the denial of a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals; * * *

* * * * *

(c) *Decision Modified or Reversed*—

* * * * *

(2) *Upon Mandate of the Circuit Court of Appeals.*—If the decision of the Board is modified or reversed by the Circuit Court of Appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the Court has been affirmed by the Supreme Court, then the decision of the Board rendered in accordance with the mandate of the Circuit Court of Appeals shall become final on the expiration of 30 days from the time such decision of the Board was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected

so that it will accord with the mandate, in which event the decision of the Board shall become final when so corrected.

* * * * *

(26 U.S.C. 1946 ed., Sec. 1140.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.322-7. *Limitations upon the Crediting and Refunding of Taxes Paid.*—

* * * * *

(d) *Overpayment determined by the Tax Court.*—In any case where a person having a right to file a petition with The Tax Court of the United States with respect to a deficiency in income tax imposed by chapter 1 filed such petition within the prescribed time, no credit or refund of the tax for the year to which the deficiency relates shall be allowed or made, and no suit for the recovery of any part of such tax shall be instituted by the taxpayer, subject to the following exceptions:

* * * * *

(4) Where the amount collected is in excess of the amount computed in accordance with the decision of The Tax Court which has become final, the excess payment shall be credited or refunded within the period of limitation provided in section 322 (b).

* * * * *

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